

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

ERNEST MILLER,

Plaintiff,

v.

KUBICKI, *et al.*,

Defendants.

Case No. 1:20-cv-00812-BAM (PC)

ORDER DIRECTING CLERK OF COURT TO
RANDOMLY ASSIGN DISTRICT JUDGE TO
ACTION

FINDINGS AND RECOMMENDATIONS
RECOMMENDING PLAINTIFF'S MOTION
FOR LEAVE TO PROCEED *IN FORMA*
PAUPERIS BE DENIED

(ECF No. 10)

FOURTEEN (14) DAY DEADLINE

Plaintiff Ernest Miller ("Plaintiff") is a state prisoner proceeding *pro se* in this civil rights action pursuant to 42 U.S.C. § 1983. Plaintiff initiated this action on May 28, 2020 in the United States District Court for the Northern District of California. (ECF No. 1.) On June 11, 2020, the case was transferred to the Eastern District. Plaintiff filed a motion to proceed *in forma pauperis* together with a certified copy of his inmate trust account statement on June 25, 2020. (ECF No. 10.)

Plaintiff is subject to 28 U.S.C. § 1915(g), which provides that "[i]n no event shall a prisoner bring a civil action . . . under this section if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state

1 a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious
2 physical injury.”¹

3 The Court has reviewed Plaintiff’s complaint and finds that his allegations do not satisfy
4 the imminent danger exception to section 1915(g).² Andrews v. Cervantes, 493 F.3d 1047,
5 1053–55 (9th Cir. 2007). The crux of Plaintiff’s complaint appears to be that he has been given
6 bad or poisoned food, or no food at all, whenever he is housed at North Kern State Prison.
7 Plaintiff also includes vague allegations regarding prison staff beating prisoners to death over
8 food, robbery, rape, property theft, and wrongful imprisonment. (ECF No. 1, pp. 4–7.) All of the
9 named defendants are employees of North Kern State Prison. (Id. at 3–4.) However, at the time
10 the complaint was filed, Plaintiff was housed at Salinas Valley State Prison in Soledad,
11 California. (Id. at 1, 72.) Therefore, Plaintiff has failed to allege that he was in any imminent
12 danger of serious physical injury at the time the complaint was filed, because he is no longer
13 housed at the institution where the violations allegedly occurred and where the Defendants are
14 employed. Plaintiff has not satisfied the exception from the three strikes bar under 28 U.S.C.
15 § 1915(g), and Plaintiff must pay the \$400.00 filing fee if he wishes to litigate this action.

16 Accordingly, the Court HEREBY ORDERS the Clerk of the Court to randomly assign a
17 District Judge to this action.

18 Further, it is HEREBY RECOMMENDED that:

- 19 1. The motion to proceed *in forma pauperis*, (ECF No. 10), be DENIED, pursuant to 28
20 U.S.C. § 1915(g); and
- 21 2. Plaintiff be ORDERED to pay the \$400 initial filing fee in full to proceed with this
22 action.

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24 ¹ The Court takes judicial notice of the following United States District Court Cases: (1) Miller v. Access Securepak,
25 Case No. 2:07-cv-01538-FCD-CMK (E.D. Cal.) (dismissed December 19, 2007, for failure to state a claim); (2)
26 Miller v. King Harris Pub’ns Magazine, Case No. 1:07-cv-01152-LJO-GSA (E.D. Cal.) (dismissed March 12, 2008,
27 for failure to state a claim); (3) Miller v. Hanson, Case No. 2:09-cv-00952-FCD-KJM (E.D. Cal.) (dismissed June 25,
2009, as frivolous); (4) Miller v. Blender Magazines, Case No. 1:07-cv-01042-AWI-WMW (E.D. Cal.) (dismissed
August 10, 2009, for failure to state a claim); (5) Miller v. CDC Warden & Staff, Case No. 1:07-cv-01416-LJO-DLB
(E.D. Cal.) (dismissed September 8, 2009, for failure to state a claim); and (6) Miller v. McDonald, Case No. 2:09-
cv-00772-GGH (E.D. Cal.) (dismissed September 10, 2009, for failure to state a claim).

28 ² The Court expresses no opinion on the merits of Plaintiff’s claims.

1 These Findings and Recommendations will be submitted to the United States District
2 Judge assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). Within
3 **fourteen (14) days** after being served with these Findings and Recommendations, Plaintiff may
4 file written objections with the court. The document should be captioned “Objections to
5 Magistrate Judge’s Findings and Recommendation.” Plaintiff is advised that the failure to file
6 objections within the specified time may result in the waiver of the “right to challenge the
7 magistrate’s factual findings” on appeal. Wilkerson v. Wheeler, 772 F.3d 834, 839 (9th Cir.
8 2014) (citing Baxter v. Sullivan, 923 F.2d 1391, 1394 (9th Cir. 1991)).

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10 IT IS SO ORDERED.

11 Dated: June 26, 2020

12 /s/ Barbara A. McAuliffe
13 UNITED STATES MAGISTRATE JUDGE
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